

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 6, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2017AP732
STATE OF WISCONSIN**

**Cir. Ct. No. 2014SC027924
IN COURT OF APPEALS
DISTRICT I**

SCOTT FISHER,

PLAINTIFF-RESPONDENT,

V.

THOMAS C. WILKOSKI,

DEFENDANT-APPELLANT.

APPEAL from an order of the trial court for Milwaukee County:
CLARE L. FIORENZA, Judge. *Reversed in part and cause remanded with
directions.*

¶1 DUGAN, J.¹ Thomas C. Wilkoski appeals the trial court's order awarding damages to Scott Fisher, his former partner, for breach of their

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2015-16). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

partnership agreement (the “agreement”).² This matter arises from Fisher’s small claim action against Wilkoski for payment of partnership expenses and for inspection work done on behalf of the partnership.

¶2 On appeal, Wilkoski asserts that pursuant to the agreement, a partner may retire from the partnership by giving sixty-days written notice to the partnership of the partner’s intent to retire. He argues that, upon expiration of the sixty days, the partner is no longer a partner and, therefore, is not responsible for any expenses of the partnership.

¶3 By contrast, Fisher argues that pursuant to the agreement, Wilkoski continued to have the rights and obligations associated with his partnership interest, including the right to a share of the profits and liability for losses, until his interest in the partnership was properly transferred, because the partnership continued and was not dissolved. Fisher asserts that there was no transfer of Wilkoski’s interest until the purchase price for Wilkoski’s interest was determined and Fisher paid that amount to Wilkoski.

¶4 We hold that, under the terms of the agreement, Wilkoski was no longer a partner upon expiration of the sixty-days written notice that he intended to retire and that, as of that date, he was not responsible for the debts of the

² Wilkoski’s notice of appeal states that he is appealing the trial court’s judgment awarding Fisher “\$5,634.15 plus costs and disbursements.” However, Wilkoski’s initial appellate brief points out that the judgment amount includes awards on three claims and expressly states that his “appeal challenges only the first of those”—the \$5,181.14 award for breach of the partnership agreement. Wilkoski also notes that the judgment includes a \$56.40 setoff for his counterclaim for the value of some partnership property, and states that “this appeal does not challenge that ruling.” Thus, the only ruling before us on appeal is the trial court’s determination with respect to the breach of the partnership agreement claim, which presents a question of law. See *Deminsky v. Arlington Plastics Mach.*, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411.

continuing partnership. Therefore, we reverse the trial court's judgment with respect to the \$5,181.14 award for breach of the partnership agreement and remand with directions to calculate the correct damage award for that claim.

¶5 The following background facts, which the parties agree are accurate, provide essential context for our analysis. The background facts are taken from the trial court's decision and supplemented by the record. Additional relevant facts are included in the discussion.

BACKGROUND

¶6 Fisher and Wilkoski were each fifty percent owners of a partnership created in 1985 for the purpose of owning and operating an aircraft and aircraft hangar. The aircraft and the hangar were partnership property. The partnership did not engage in any business that generated revenue—it only incurred expenses related to the operation of the aircraft and the hangar.

¶7 Fisher and Wilkoski entered into an amended partnership agreement dated March 4, 2004. Under the agreement, they were to share equally in the operating expenses of the aircraft and hangar.

¶8 The agreement provided that the partnership shall not be dissolved by the retirement of a partner, rather the partnership would be continued by the remaining partners. It also gave the partnership the right to purchase the retiring partner's interest and, if the partnership chose not to do so, then Fisher as the sole remaining partner, had the same right.

¶9 On March 6, 2013, Wilkoski gave a sixty-day written notice of his intent to retire from the partnership, which read in part "I am compelled to give you the required [sixty-]day notice of my withdrawal." As of that date, Wilkoski

made no additional contributions to the expenses incurred by the partnership for the operation of the aircraft and hangar.

¶10 From January 1, 2013 through August 13, 2014, Fisher paid all the aircraft and hangar expenses incurred. During that timeframe, Fisher also performed inspections of the aircraft.

¶11 The partnership did not choose to purchase Wilkoski's interest, but Fisher did choose to purchase the interest. On August 13, 2014, more than seventeen months later, Fisher paid Wilkoski the purchase price for his interest in the partnership as calculated under the agreement.

¶12 The trial court found that Fisher paid \$10,362.28 for expenses related to the aircraft and the hangar from January 1, 2013 until August 13, 2014, including the reasonable value of Fisher's labor for inspecting the aircraft. The trial court awarded Fisher half of the total expenses in the amount of \$5,181.14.

¶13 This appeal followed.

STANDARD OF REVIEW

¶14 This appeal involves the interpretation of the agreement. "Interpretation of a contract is a question of law which this court reviews *de novo*." ***Deminsky v. Arlington Plastics Mach.***, 2003 WI 15, ¶15, 259 Wis. 2d 587, 657 N.W.2d 411.

¶15 Contracts are interpreted to give effect to the parties' intent, as expressed in the contractual language. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. Such

language is to be interpreted consistent with what a reasonable person would understand the words to mean under the circumstances. *Id.*

DISCUSSION

The Effective Date of Wilkoski’s Retirement from the Partnership was Sixty Days after He Gave Written Notice of His Intent to Retire

Relevant Provisions of the Agreement

¶16 The agreement contains the following relevant provisions. The general introductory language incorporates the provisions of the Uniform Partnership Act (UPA) of the State of Wisconsin and provides,

NOW, THEREFORE, in consideration of the following mutual covenants, the parties hereby form a General Partnership (the “Partnership”) *pursuant to the provisions of the Uniform Partnership Act of the State of Wisconsin, under the following terms and conditions and the rights and liabilities of the Partners shall be as provided in the Act except as herein otherwise expressly provided.*³

(Emphasis added.)

¶17 Article VI of the agreement which is entitled “Transfer Of Partnership Interest” provides,

Section 6.02. Withdrawal of a Partner.

- (a) A Partner may retire from the Partnership after giving sixty (60) days written notice to the Partnership of his intention to retire. The Partnership shall not be dissolved by the retirement

³ WISCONSIN. STAT. Ch. 178, the UNIFORM PARTNERSHIP ACT (UPA) (2003-04). Chapter 178 was repealed and recreated as the Wisconsin Uniform Partnership Law effective July 1, 2016, by 2015 Wisconsin Act 295 and is codified at WIS. STAT. §§ 178.0101 to 178.1202 (2015-16). As noted, our references are to the 2003-04 version of the UPA.

of a Partner and the business of the Partnership shall be continued by the remaining Partners.

- (b) Following the notice of retirement, the Partnership may, at its option, exercisable in writing, *purchase and retire all* or any portion of the interest of the retiring Partner, and continue the Partnership business under its present name. The purchase price for such Partnership shall be the amount determined under Section 6.03 hereof as if the retiring Partner died on the date of retirement. The Partnership's election...shall be exercised by giving written notice...within thirty (30) days after receipt of notice of retirement.
- (c) If the Partnership shall elect not to purchase any or all of the Partnership interest, then the other Partners have a similar option for thirty (30) days to purchase on the same terms and conditions.... Written notice of exercise of any option hereunder by a Partner shall be sent to the retiring Partner and the Partnership during the applicable option period.

(Emphasis added.) The agreement further provides that if neither the partnership nor a partner elects to purchase the interest of the retiring partner then the partnership is to be dissolved, its affairs wound up and all its properties distributed in liquidation. *See* sec. 6.02(d).

¶18 As noted, the purchase price for the interest of a retiring partner is to be determined under section 6.03 of the agreement, which states,

- (b) Purchase Price. The purchase price to be paid for the interest of a deceased Partner shall be equal to the capital account of the deceased Partner as set forth in the books of the Partnership as of the end of the month preceding the month in which such Partnership interest is purchased, provided that in determining such amount all tangible assets owned

by the Partnership shall be valued at their fair market value rather than net book value.⁴

¶19 Lastly, section 6.03 of the agreement defines how payment is to be made as follows:

- (c) Payments. The Partnership shall pay the value of the purchased Partnership interest to the estate of the deceased Partner on or before one year after the date of death. Interest at the Prime Bank rate shall begin to accrue on the date of death and shall be payable by the Partnership on the unpaid balance with each payment of principal.

¶20 Fisher argues that under the plain language of the agreement, Wilkoski's retirement meant that the business of the partnership would be carried on by Fisher without Wilkoski's participation. Further, he argues that notwithstanding his retirement from the business, Wilkoski continued to have the rights and obligations associated with his partnership interest, including the right to a share of profits and liability for losses, until the transfer of Wilkoski's interest was completed. He argues that, pursuant to the terms of the agreement, the transfer of Wilkoski's interest could not occur until (1) the partnership exercised or rejected its option to purchase Wilkoski's interest; (2) the other partners exercised or rejected their option to purchase Wilkoski's interest; and (3) the value of Wilkoski's interest had been determined according to the formula in the agreement. The formula calculated the value of Wilkoski's interest, in part, as the value of his capital account at the end of the month preceding the purchase of the interest. Fisher then concludes by contending that no partnership interest could be transferred until the purchase price was paid.

⁴ Although not relevant here, the agreement goes on to define the means of determining the value of the interest if the parties cannot agree.

¶21 By contrast, Wilkoski argues that under the plain language of the agreement, a partner may retire from the partnership by giving a sixty-day notice to the partnership of the partner's intent to retire. He argues that, upon the expiration of the sixty days, the partner is no longer a partner.

¶22 Neither party initially argues the agreement is ambiguous. However, each party asserts arguments, if the court were to find the agreement ambiguous.

*Fisher's Arguments are Contrary to the UPA
Provisions Incorporated into the Agreement*

¶23 Fisher argues that the UPA does not cover the partnership because the partnership is not a business which the UPA defines as a trade, occupation or profession, citing WIS. STAT. § 178.01(2)(b). He also asserts that the UPA does not cover the partnership because the UPA defines a partnership as an association of two or more persons to carry on as co-owners a business for profit, citing WIS. STAT. § 178.03(1). He states that the partnership was not operated for profit.

¶24 However, Fisher ignores the fact that the agreement specifically incorporates the UPA provisions into the agreement's terms as follows:

NOW, THEREFORE, in consideration of the following mutual covenants, the parties hereby form a General Partnership (the "Partnership") *pursuant to the provisions of the Uniform Partnership Act of the State of Wisconsin, under the following terms and conditions and the rights and liabilities of the Partners shall be as provided in the Act except as herein otherwise expressly provided.*

(Emphasis added.)

¶25 Therefore, even if the partnership does not fall under the UPA, because the agreement specifically incorporates the UPA provisions unless

otherwise expressly provided by the agreement, Fisher and Wilkoski are bound by those provisions.

¶26 Because the UPA applies to the agreement, we next look to how the retirement of a partner is addressed under the UPA’s provisions. *Lange v. Bartlett* discusses the UPA provisions that are applicable to this case. 121 Wis. 2d 599, 601, 360 N.W.2d 702 (Ct. App. 1984). In *Lange*, this court explained that under the UPA, “[w]hen a partner dies or retires, the partnership is dissolved. However, the partnership is not terminated upon dissolution; it continues until the wind-up of the partnership affairs are completed.” See *id.* (citations omitted). This court went on to explain, “[i]t is at this juncture, the point of dissolution,⁵ that the retiring partner makes an election” to “either force the partnership to ‘wind-up’” or “he can permit the business to continue and claim *as a creditor the value of his interest at dissolution.*” See *id.* (emphasis added).

¶27 The *Lange* court further explains what happens when a retiring partner elects to allow the partnership to continue,

If the outgoing partner elects to allow the business to continue, then that partner has a second election—to receive either interest or profits from the date of dissolution—in addition to the value of his or her interest in the partnership.... The profits garnered from continuation are different from the profits at wind-up simply because, in a continuation, *the outgoing partner is not responsible for the debts of the continuing partnership. The outgoing partner, instead, takes as a creditor.*

Id. at 602-03 (emphasis added; citations omitted). This court further explained the rationale behind the rule stating,

⁵ The court’s use of dissolution is synonymous with retirement.

Although this election may seem somewhat onesided as the retiring partner is no longer involved in the business, it serves as ‘a species of compulsion...to those continuing the business...to hasten its orderly winding up.’...The second election rests partly on the use of the outgoing partner’s assets in the conduct of the business.... The right to a share of the profits exists only until the final accounting has been made.

Id. at 603 (citations omitted).

¶28 Thus, when a partner retires and the partnership will continue, *Lange* teaches us that the partner no longer has any rights as a partner. Moreover, the outgoing partner is not responsible for the debts of the continuing partnership, but rather takes the value of the partnership interest as a creditor. It is also evident from *Lange* that the date of retirement is not the date that the value of the retiring partner’s interest is determined, as Fisher argues. Between the date of retirement and the date of the final accounting, the retiring partner is entitled to elect interest on the value of the partnership interest or the share of the profits. On remand, *Lange* directed that,

If the trial court finds continuation has occurred, then the second part of the trial should focus on the value of the partnership assets *on the date of dissolution* plus any evidence showing the profits made by the continuing business *from the time of dissolution* to the date of the hearing. Interest on the value of the former partner’s share of the partnership should also be determined. At the conclusion of the testimony, the trial court shall make a finding of the value of each. *The former partner must make the second election at this point.* Judgment should then be entered accordingly.

Id. at 605⁶ (emphasis added).

⁶ Wilkoski never requested interest on the value of his portion of the partnership and the parties agree the partnership had no profits, only losses.

¶29 As stated, the agreement incorporated the UPA provisions, unless the agreement expressly provided otherwise. Furthermore, the agreement does not expressly provide that a retiring partner does not withdraw from the partnership at the time of retirement as held in *Lange*, but somehow remains a restricted partner with no rights in the business and, under the facts of this case, subject to losses for seventeen months. Rather, the agreement provides that a partner may retire by giving a sixty-day written notice to the partnership. The partnership and the partners had a total of sixty days to decide whether to purchase Wilkoski's interest in the partnership and continue the partnership business or have the partnership dissolve. At the end of the sixty day written notice, Wilkoski was either retired and the partnership continued, or he remained a partner while the partnership was dissolved. Pursuant to the holding in *Lange*, at the end of sixty days, Wilkoski was retired, Fisher had elected to purchase Wilkoski's interest, and Wilkoski would receive the value of his interest as a creditor.

¶30 In this case, the partnership continued because Fisher exercised his option to purchase Wilkoski's interest in the partnership. Therefore, Wilkoski retired as of May 5, 2013—sixty days after giving written notice of his intent to retire.

¶31 By contrast, Fisher argues that section 6.03(b) of the agreement provides that,

The purchase price to be paid for the interest of a deceased [P]artner shall be equal to the capital account of the deceased Partner as set forth in the books of the Partnership as of the end of the month preceding the month in which such Partnership interest is purchased....

From this provision, he argues that the agreement makes it clear that no partnership interest transfers until it is paid for and that payment could occur long after retirement.

¶32 As noted above, Fisher’s argument is contrary to this court’s holding in *Lange*, 121 Wis. 2d at 599. In *Lange*, this court held that Lange became a creditor of the partnership on the date of his retirement. *Id.* at 603. The partnership did not pay Lange any money until some time after the trial was completed. *See id.* at 600-01. Yet, the court held that if Lange had retired, immediately upon his retirement, he was no longer a partner—he became a creditor. *See id.* at 602-03.

¶33 Consistent with the holding in *Lange*, under section 6.02 of the agreement, the partner retires upon the expiration of the sixty-day notice or upon the date the partnership exercises the option within the sixty-day notice period to purchase and retire the partner’s interest. The date the partnership or partner exercises the option is the date the partner retires and becomes a creditor. That is also the date for the next step—determining the purchase price under section 6.03(b) of the agreement.

¶34 As noted above, the agreement incorporates the UPA, unless it expressly states otherwise. Fisher has failed to demonstrate that the agreement contains express provisions that override the terms and provisions of the UPA. Therefore, the holding in *Lange* controls the facts of this case.

¶35 Therefore, this court holds that under the facts of this case, at the end of the sixty-day notice period, Wilkoski’s retirement was effective. Fisher timely exercised his option right to purchase Wilkoski’s interest and as of May 5, 2013, Wilkoski was no longer involved in the partnership’s business and became a creditor in relation to being paid the value of his partnership interest. He no longer had any rights as a partner and was no longer responsible for the debts of the continuing partnership. What remained for determination was the value of

Wilkoski's interest in the partnership and payment of that amount. As in *Lange*, the fact that Wilkoski was not paid until some time after he retired, does not effect the date that he no longer possessed any interest in the partnership and the date that Fisher purchased Wilkoski's interest.⁷

The UPA Bars Fisher's Claim for Compensation for His Time Inspecting the Aircraft

¶36 While acknowledging that the UPA, WIS. STAT. § 178.15(6), says that “no partner is to receive remuneration[; that is, payment,] for acting in the partnership business,” Fisher argues that the aircraft inspection was an expense for which he can be reimbursed. He further states that under the UPA, partners are entitled to an equal share of the profits and are not paid a salary. He notes that there is symmetry between the right of partners to profits and the restriction on receiving remuneration. But he then goes on to state that, in this case, the partnership had no profits—all it had were losses and the parties knew that going into the agreement. Fisher merely asserts that because there was no profit in the partnership, he should be compensated for his time and labor in inspecting the aircraft. His argument is directly contrary to the provisions of the UPA.

¶37 Further, without citing any authority, Fisher argues that his time and labor in inspecting the aircraft was not acting in the partnership business. However, his argument is contradicted by the partnership's past practice regarding

⁷ Because we hold that the agreement incorporated the terms of the UPA, that the holding in *Lange* applies to the facts of this case, and that Fisher failed to demonstrate that any terms of the agreement contain express provisions that override the terms of the UPA or the holding in *Lange*, we need not address the parties' arguments regarding the interpretation of ambiguous contracts.

the aircraft inspections. Prior to 2013 and 2014, Fisher and Wilkoski both jointly performed the inspection and neither sought compensation from the partnership.

¶38 As a last ditch effort, Fisher then argues that Wilkoski's obligation to pay for losses did not end with retirement because he continued to have rights and obligations of a partner. We disposed of that argument above.

¶39 This court holds that Fisher's time and labor in inspecting the aircraft constitutes remuneration for acting in the partnership business and is, therefore, barred by the terms of the UPA that were incorporated into the agreement.

CONCLUSION

¶40 For the reasons stated above, we reverse the trial court's order that Wilkoski was responsible for any share of the partnership losses after May 5, 2013, and that Wilkoski was responsible for half the value of Fisher's time and labor in inspecting the aircraft, and remand to the trial court for calculation of the amounts Wilkoski is responsible for, consistent with this decision.

By the Court.—Order reversed in part and cause remanded with directions.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.